APPEAL NO. 93101

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. (1989 Act), arts. 8308-1.01-11.10 (Vernon Supp. 1993). A contested case hearing was held on December 29, 1992 in (city), Texas, venue having been transferred to that city after a benefit review conference was held in (city), Texas. The issue before hearing officer (hearing officer) was whether the claimant sustained disability after his employment was terminated on June 3, 1992, and what temporary income benefits (TIBS) are due. The appellant, which is claimant's employer's workers' compensation insurance carrier (hereafter carrier), contends on appeal that the hearing officer's determination that claimant had disability from August 15 through December 22, 1992 is incorrect and not supported by the evidence. The carrier also alleges that the hearing officer erroneously failed to place sufficient weight on the medical evidence and that she erroneously prohibited or limited the carrier from presenting relevant evidence. The respondent (hereafter claimant) did not file a response.

DECISION

We affirm the decision and order of the hearing officer.

The claimant was employed as a welder for HTA Aerostructures, formerly called (employer), when he injured his back while lifting a barrel about six feet in diameter on (date of injury). (A barrel was described as an exhaust nozzle, which was what the employer manufactured.) He said he sought medical attention the next day from employer's doctor, Dr. W, and was thereafter put on light duty status and given tasks such as filing and copying. He also trained two employees. He did not lose any time from work until April or May of 1992, during which time he received TIBS for three weeks. He was terminated by employer on June 3rd because, employer claimed, he misrepresented that he was leaving work to go to appointments with his doctor and to physical therapy.

The claimant testified that he continued to receive medical treatment after he was terminated, including from Dr. W, Dr. B (to whom Dr. W had referred him), and from carrier's doctor, Dr. D. He also stated that he looked for work, registered with the Texas Employment Commission and completed a job search that involved applying for 24 jobs in 12 days. He was hired by employer and underwent training, but after working four hours had to quit because he was physically unable to do the job. He also applied with MC, where he passed a welding test and a drug test but could not pass the pre-physical exam because of his back x-rays. He went back to BM, where he had worked for eight years, but was told they could not hire him because of his back and because of the report of Dr. D which set forth his lifting abilities. He said he also applied at Master Lube, which was aware of his back problems but he said he told them he could do the job because it required no bending. The claimant also enumerated other places he applied for jobs. At the hearing he said he had gone back to work in a maintenance job on December 23, 1992.

GM, who had been claimant's supervisor, testified that claimant had told him he also

worked on cars at his brother's automotive shop, which claimant referred to as his shop, too. He said on one occasion around Thanksgiving of 1992 he saw claimant welding the hinges on a truck tool box at the shop, but stated on cross-examination that he did not know whether claimant was paid for this work. When asked whether he might have ever said he and his brother owned the shop together, claimant replied, "I might have."

ML, with whom claimant worked in shipping and receiving while on light duty between April and June of 1992, said claimant counted inventory, filed papers, made photocopies, and did packaging and stapling things together. He did not characterize claimant's duties as clerical, and he said that claimant was a good employee.

Employer's human resource specialist, DS, said that claimant was terminated on June 3, 1992, in part because of misrepresenting to his employer that he was going to physical therapy. Mr. S said claimant was also terminated because of excessive unexcused absences for which he had been counseled previously. SB, a production leader for employer, testified that he was present when claimant was terminated and that claimant admitted he had not told his employer the truth about where he was going when leaving the plant. But for that, he said, claimant would still be working for employer.

The claimant testified that he continues to have pain, and sometimes numbness, in his back. Under cross-examination claimant said he was at the Guadalupe River on Memorial Day weekend and that he saw Dr. W' nurse there, but he denied that he was actually tubing on the river.

The carrier contends that the evidence shows the claimant did not sustain disability after June 3, 1992; that the hearing officer failed to place sufficient weight on the medical evidence which it says established that claimant was able to work; and that claimant's lack of employment was due to his termination for misconduct. "Disability" is defined in the 1989 Act as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Both medical and lay evidence can be considered in determining whether disability exists. Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992.

Because there is no limitation on the type of evidence that can be considered in a disability case, it may be appropriate at this point to address the carrier's second point of error, that the hearing officer erroneously prohibited or limited the carrier from presenting relevant evidence. The record of the hearing shows that eight of carrier's exhibits were not admitted because they had not been timely exchanged prior to the hearing, as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). The documents which were excluded are of two basic types: medical records and reports, and records of the employer (two exhibits also were calendar pages for the months of May and June of 1992). Carrier's attorney stated at the hearing that she had not exchanged the employer's

records (which included work limitation agreements and time cards) because she had only seen them for the first time as of the day of the hearing. She also stated that she had tried unsuccessfully to subpoena several of the documents which were excluded, although it was not entirely clear whether this included both medical records and the employer's records. However, the carrier made no written request for a subpoena in compliance with Commission Rule 142.12(c). Given these facts, we find that the hearing officer's determination of no good cause for failure to timely exchange these documents was not an abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 92108, decided Mary 8, 1992. The fact that the information in these documents could have been highly relevant to carrier's case does not alter this result.

The carrier also contends that, despite her ruling, the hearing officer allowed the claimant to introduce several exhibits which were not timely exchanged with the carrier. The record shows that the carrier did not raise this objection at the time any of claimant's exhibits were being offered into evidence. As such, it would have been deemed to have waived any objection, and the same cannot be raised on appeal. Texas Workers' Compensation Commission Appeal No. 91104, decided January 21, 1992.

Turning again to the issue of disability, we have held that determining the end of disability within the meaning of the 1989 Act can be a difficult and imprecise matter. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. For purposes of such determination, that decision distinguished a situation where a claimant has received a medical release to full duty status from one in which the medical release is conditional. In the latter case, disability, by definition, has not ended unless the employee is able to obtain and retain employment at preinjury wages; evidence to establish this must show there is employment at preinjury wage levels reasonably available to the employee meeting the conditions of the medical release, taking into consideration reasonable limitations on the type of work suitable within the framework of the employee's abilities, training, experience and qualifications, and that the employee has not availed himself of such employment opportunities.

The evidence in this case shows that on May 7, 1992, a Dr. E found probable malrotation of the left SI joint and said the claimant could perform light duty. In a June 8th specific and subsequent medical report (Form TWCC-64), Dr. W diagnosed lumbar sprain/strain and gave the claimant a lifting restriction of 15 pounds, with no excessive pushing, pulling, bending, or stooping. On the other hand, Dr. Ds July 20th report, while recommending that claimant be referred to a chiropractor, stated there was "no need to restrict him from doing work as a welder and activity is encouraged." While Dr. D did not impose any lifting limitations, her report stated claimant should be able to occasionally lift up to 55 pounds, frequently lift up to 39-40 pounds, and continuously lift up to 24 pounds. The claimant testified that this letter prevented his employment with Butler Manufacturing because they said "the plates would consist of more than 50 pounds."

While we have held that the 1989 Act contains no requirement that a claimant seek employment, particularly where medical restrictions exist, *see* Appeal No. 91045, *supra*, there was sufficient evidence in the record to show that this claimant actively sought employment and that at least on two occasions it was denied because of his physical condition. In addition, at least two doctors have released him to restricted duty work. We find this is sufficient evidence to support the hearing officer's determination that the claimant had disability through December 22, 1992.

The fact that claimant's presence in the job market was due in part to a termination for cause does not, in and of itself, dispose of the issue nor change this result. This situation was addressed in Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, which stated, "a broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause has the potential to undermine a very basic purpose of workers' compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury. While virtually all case authority holds that the reason for the termination must be justified or for a just cause, the results of the injury remain and may prevent any or very limited gainful employment at all. Therefore, we are convinced that an approach to this issue which also factors in the continuing effect of the injury on the capacity to obtain and retain some gainful employment is more in keeping with the 1989 Act, the intent and purposes of workers' compensation, and is fairer to all parties." (Citation omitted.)

That decision also stated that most cases involving these issues will be resolved within the specific factual setting. Here, the claimant testified that on or about August 15, 1992, he was denied employment by a former employer because of information in a medical report. The hearing officer is the sole judge of the relevance and materiality of the evidence, and of its weight and credibility. Article 8308-6.34(e). There was sufficient evidence in the record to support her apparent belief that from June 3 to August 15, 1992, the claimant's lack of employment was due to other than his compensable injury, but that as of August 15th his circumstances met the statutory definition of disability. We will set aside the decision of the hearing officer only if the evidence supporting his or her determination is so weak or against the great weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Upon review of the record from this hearing, we do not find this to be the case.

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge